Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Cellular Telecommunications Industry	)	WT Docket No. 98-229
Association's Petition for Forbearance	)	
From Commercial Mobile Radio Services	)	
Number Portability Obligations	)	
	)	
and	)	
	)	
Telephone Number Portability	)	CC Docket No. 95-116

PETITION FOR RECONSIDERATION

Dated: May 27, 1999

GTE Service Corporation and its telephone and wireless companies

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Pursuant to Section 1.429 of the Commission's Rules, GTE Service Corporation and its telephone and wireless companies ("GTE") hereby petition for reconsideration of the *Memorandum Opinion and Order* in this proceeding.[1] As a provider of commercial mobile radio services ("CMRS"), GTE participated in the proceeding, is directly affected by the *Order*, and thus is entitled to seek reconsideration.

I. INTRODUCTION AND SUMMARY

In its October 1997 Petition, CTIA requested that the Commission invoke Section 10 of the Act to forbear from enforcing the requirement that certain CMRS providers deploy the capability to port wireless telephone numbers. CTIA asked that the

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[1] *See Memorandum Opinion and Order*, FCC 99-19 (released Feb. 9, 1999) ("*Order*"). Public Notice of the *Order* appeared in the Federal Register on April 27, 1999. 64 Fed. Reg. 22562. This petition is thus timely filed. *See* 47 C.F.R. § 1.429(d).

Commission forbear at least until the end of the five-year buildout period for broadband PCS licensees, and at that time, if appropriate, to begin a proceeding to determine whether to reimpose wireless local number portability ("LNP" or "WNP"). GTE and many other parties supported forbearance.

The *Order* applied Section 10 to extend the compliance date for wireless LNP from March 31, 2000,[2] to November 24, 2002, but kept the rule in place and directed carriers to proceed toward compliance. The rule has thus been delayed but remains in force.[3]

GTE supports the Commission's decision to grant the extension. GTE agrees with the Commission's conclusion that the March 2000 deadline had to be deferred, given that standards bodies have not resolved certain technical issues, and it is clear that neither consumers nor competition would benefit from imposing wireless LNP. As the Commission pointed out, "not only is CMRS competition currently growing rapidly

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2 *See* Telephone Number Portability, *First Report and Order*, 11 FCC Rcd 8352 (1996) (adopting compliance date for LNP of June 30, 1999, for CMRS carriers); *Memorandum Opinion and Order*, 13 FCC Rcd 16315 (CCB 1998) (extending compliance date to March 31, 2000, per authority granted to Common Carrier Bureau in the *First Report and Order*).

3 The rule at issue is codified at 47 CFR § 52.31(a). A separate rule, Section 52.31(b), requires certain CMRS providers to be able to query landline LNP databases. CTIA did not seek forbearance from this "query" requirement, and GTE seeks no relief from it in this petition. GTE's sole concern is with the Section 52.31(b) requirement that CMRS providers deploy the capability to port wireless numbers. In this petition, GTE uses the term "wireless LNP" to refer to that separate requirement.

without LNP, but in the near term, LNP does not appear to be critical to ensuring that this growth continues."[4].

GTE, however, believes that the *Order* is flawed in several respects that require the Commission to modify it to grant the relief that Section 10 mandates.

First, having found that the three statutory forbearance elements were met, the Commission then failed to do what Section 10 requires: that it "shall forbear." Forbearance means eliminating a requirement. It does not mean merely changing a rule's compliance date and leaving the rule in force – particularly where, as here carriers are also ordered to work quickly toward compliance. The use of the term "forbearance" by the Commission and in the 1996 Act shows that it means to eliminate, not simply defer, regulation. As CTIA had requested, the Commission should eliminate the wireless LNP rule and, if facts later develop that may warrant reinstating the rule, conduct a new proceeding at that time. What the *Order* granted, however – a delay in a rule's effective date – is not forbearance. The *Order* should be modified to grant what Section 10 requires.

Second, the Commission based its decision that CMRS carriers proceed to deploy wireless LNP by 2002 on the assumptions that number pooling might be required in a future proceeding as a solution to number exhaust, and that wireless LNP was necessary to accomplish number pooling. This cart-before-the-horse rationalization for wireless LNP is neither logical nor legally valid. An agency cannot preserve a rule built on speculation that it might be needed for some other rule which

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[4] *Order*, at ¶ 19.

has not been adopted. Moreover, the rationale is factually incorrect. The record did not show that the capability to port wireless numbers was necessary to implement either number exhaust solutions generally or thousands-block pooling specifically. In fact, the two are technically separate. Wireless LNP is not a mandatory step on the road to thousands-block pooling for wireless numbers, and there are steps carriers must take to implement pooling beyond those required for wireless LNP. The key factual errors in the *Order* require that it be modified to grant true forbearance, not merely a new effective date.

Third, the Commission erred by deciding that wireless LNP is not necessary today but will become necessary in November 2002. The Commission's finding that the CMRS marketplace is increasingly competitive is flatly inconsistent with its decision to impose only "temporary forbearance." And its assumptions about conditions in November 2002 constitute impermissible speculation about the future rather than on facts in the record, as the law requires. Worse, such speculation has led here to a perverse result: Increased CMRS competition carries with it more regulation. Wireless carriers' "reward" for becoming more competitive will be to have to incur the huge costs of wireless LNP.

Accordingly, GTE requests that the Commission forbear completely from applying the LNP rule to CMRS carriers as Section 10 requires. Should future developments warrant taking a new look at imposing this requirement, the Commission has full authority to conduct a proceeding to do so at a later time.

II. DISCUSSION

A. The Commission failed to grant forbearance in the manner required by law.

In the *Order*, the Commission purported to exercise its forbearance authority, but it merely amended the wireless LNP rule to extend the effective date. The rule remains in force; in fact, the Commission directed wireless carriers to "make steady progress" toward deploying LNP.[5]

Keeping a rule in place but changing its effective date is not forbearance, and exercise of "forbearance" in this manner was error. Forbearance is a different, congressionally-mandated process to eliminate unnecessary rules. The history of Section 10 and the meaning the Commission has given to forbearance show that this provision was intended to deregulate and to eliminate regulation by exempting carriers from existing obligations.

Rather than eliminating the wireless LNP requirement as Section 10 requires, the *Order* leaves the rule in place and simply changes the effective date. CMRS carriers are still subject to the wireless LNP rule, and must still take action to comply. Because the Commission determined that the statutory forbearance tests were met, Section 10 required the Commission to remove rather than merely modify the rule. True forbearance would not prevent the Commission from considering at a future date whether to reimpose LNP obligations on wireless carriers, as CTIA requested in its petition.

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[5] *Id.*, at ¶ 40.

1. Section 10 forbearance requires eliminating, not merely deferring, enforcement of wireless LNP.

Section 10, enacted as part of the 1996 Telecommunications Act,[6] is written in mandatory terms ("the Commission *shall* forbear") and requires the Commission to "forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets," if certain conditions are met.[7] The Commission itself was the source of Section 10. In 1995, the Commission sent a legislative package to Congress as part of the "reinventing government" initiative, and included a specific request for forbearance authority:

> Codify Forbearance. (Secs. 3, 203) Authorize FCC not to regulate classes of telecommunications carriers or services where unnecessary to protect the public interest. This would authorize the FCC to forbear from and streamline regulation, e.g., by eliminating the tariff filing requirement for non-dominant long distance carriers such as MCI and Sprint. This proposal would save resources, reduce paperwork, increase efficiency, and promote competition.[8]

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6 Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56, § 401, *codified at* 47 U.S.C. § 160.

7 The Commission must determine that (a) enforcement of the statute or rule is not necessary to achieve just and reasonable rates and practices for the service, (b) enforcement of the statute or rule is not necessary for protection of consumers, and (c) forbearance is consistent with the public interest. 47 U.S.C. §§ 160(a)(1-3). The Commission must also consider whether forbearance will "promote competitive market conditions," and such a determination may be the basis for a finding that forbearance is consistent with the public interest. *Id.*, § 160(b).

8 *Report on Creating an FCC for the Information Age*, 1995 FCC LEXIS 688, App. A, ¶ 1 (Feb. 2, 1995).

The Commission's statutory forbearance proposal was in direct reaction to court reversals of its efforts to eliminate rather than to modify existing obligations to file tariffs.[9] In the 10 years before the Commission's reinventing government initiative, a series of orders in the *Competitive Common Carrier* proceeding were reversed on appeal based on the rationale that the Commission did not have the authority to adopt a policy which eliminated the Section 203 obligation to file tariffs.[10] In 1994, the Commission again adopted a permissive detariffing policy.[11] It was also thrown out, this time ultimately by the Supreme Court, which held that the Commission could modify the tariff filing requirement but not eliminate it.[12] It was to obtain an additional mechanism to remove this and other requirements that the Commission sought (and obtained) Section 10 in the 1996 Act.[13]

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9 *See* Policy and Rules Concerning the Interstate, Interexchange Marketplace: Implementation of Section 254(g) of the Communications Act of 1934, as Amended, 11 FCC Rcd 20731, 20771 (1996) ("*Second Report and Order*").

10 *See AT&T Co. v. FCC*, 978 F.2d 727 (D.C. Cir. 1992), *cert. denied*, *MCI Telecommunications Corp. v. AT&T Co.*, 509 U.S. 913 (1993); *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985).

11 Tariff Filing Requirements for Interstate Common Carriers, 7 FCC Rcd 8072 (1992).

12 *MCI Telecommunications Corp. v. AT&T*, 512 U.S. 218 (1994).

13 The legislative history of the 1996 Act forbearance language supports the notion that forbearance was intended to end regulation: "Given that the purpose of this legislation is to shift monopoly markets to competition as quickly as possible, the Committee anticipates this forbearance authority will be a useful tool in ending unnecessary regulation." H.R. Rep. 104-204, 104th Cong., 1st Sess. (1995) at 89 (emphasis added).

The Commission quickly applied Section 10 to order mandatory detariffing by interstate interexchange carriers.[14] The Commission stated that "forbearance" must be interpreted in light of its historical usage. It noted that it had consistently used "forbearance" to refer to cancellation of a requirement, that its efforts to cancel tariffing had been the source of its Section 10 authority, and that the courts and Congress had used the term forbearance with reference to those efforts.[15] The Commission analogized Section 10 to a provision of the Federal Aviation Act which permitted the Civil Aeronautics Board to "exempt" a carrier from compliance with certain regulations.[16] The CAB had used this authority to prohibit compliance with a provision, an action which was upheld on appeal.[17]

The Commission also compared Section 10 to the forbearance authority in Section 332(c) of the Act applicable to CMRS carriers, and found that Section 332(c) supported its interpretation that forbearance meant eliminating an obligation:

> It seems inconceivable that Congress intended Section 10 to be interpreted in a manner that allows continued compliance with provisions or regulations that the Commission has determined were no longer necessary in certain contexts.[18]

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[14] *Second Report and Order*, 11 FCC Rcd at 20731.

[15] *Id.*, at 20770-72, ¶¶ 71-73.

[16] *Id.*, at ¶ 74.

[17] *National Small Shipments Traffic Conference, Inc. v. CAB*, 618 F.2d 819 (D.C. Cir. 1980).

[18] *Second Report and Order*, 11 FCC Rcd at 20772, ¶ 76 (emphasis supplied).

The Commission saw Section 10 forbearance as establishing a mechanism which did not previously exist – to eliminate enforcement of unnecessary provisions or rules. The Commission's position confirms that Section 10 was not enacted to enable the Commission to exercise authority it already possessed to amend rules or change effective dates "in a manner that allows continued compliance." Rather, Section 10 was an entirely separate congressionally-mandated mechanism aimed at eliminating requirements altogether.

Here, the Commission purported to apply Section 10, but the removal of an obligation as required by Section 10 did not occur. The obligation to deploy LNP remains in place. In fact, in the same sentence that said it was forbearing, the Commission warned carriers that they must quickly work toward compliance:

> While we are granting forbearance today, it is essential that the wireless industry continue to make steady progress on the interim steps necessary to achieve timely implementation of LNP, including final agreement on standards, testing of network hardware and software, and establishing a realistic schedule for deployment.[19]

Courts have made clear that the Commission does not have authority to make *de facto* modifications to a statutory scheme.[20] Here, the Commission has done just that by "forbearing" but not deregulating. Instead it has ordered a requirement to remain and to take effect at a later date. The obvious impact of such "temporary

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[19] *Order*, at ¶ 42.

[20] *See, e.g., American Financial Servs. v. FTC*, 767 F.2d 957, 965 (D.C. Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986) ("The extent of [an agency's] powers can be decided only by considering the powers Congress specifically granted it in light of the statutory language and background").

forbearance" is that the Commission has excused itself from having to develop a concurrent factual record supporting the rule at the time it takes effect. Rather, LNP will take effect without any further action by the Commission, based on a record compiled years earlier which showed that wireless LNP should not be required. This "springing compliance" scheme is inconsistent with the agency's obligation to conduct rulemakings on the record,[21] as well as with Section 10. That section created a process that exempts carriers from compliance with rules that are no longer necessary, not one that leaves rules in place today for enforcement tomorrow.

The *Order* is also contrary to law because Section 10 does not authorize the Commission, once it has found the forbearance tests met, to set an expiration date for forbearance. The statute does not preclude the Commission from re-imposing a requirement at a later date, if it later determines on a fresh record that circumstances warrant doing so. But it precludes keeping the requirement in place. The Commission has recognized that forbearance means removing a requirement, and that it could revisit its determination that forbearance applies (and reinstate a requirement) only on a new record compiled at that time. Thus in forbearing from Section 203, it stated:

> Should circumstances change such that the statutory forbearance criteria are no longer met, we have the authority to revisit our determination here, and to reimpose Section 203 tariff filing requirement.[22]

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[21] *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983); *NAACP v. FCC*, 682 F.2d 993, 997 (D.C. Cir. 1982).

[22] *Second Report and Order*, 11 FCC Rcd at 20767, ¶ 64.

But the Commission has not made, and cannot make at this time, a determination that the forbearance criteria are not met for wireless LNP as of November 24, 2002. Accordingly, the Commission cannot lawfully set a date when forbearance must end without any further action by the Commission.

2. The Commission's action conflicts with the deregulatory goals of the 1996 Act.

The 1996 Act was enacted to facilitate development of a "pro-competitive, de-regulatory national policy framework designed to accelerate rapidly [sic] private sector deployment of advanced telecommunications."[23] Section 10 was an integral part of Congress's deregulatory goals. Forbearance was not to be merely an authority that the Commission was granted to exercise at its discretion. Rather, when the statutory tests are met, the Commission "shall forbear."

The *Order* does not reconcile or even acknowledge the conflict between its treatment of wireless LNP obligations and the goals of the 1996 Act. It does not explain why an action purportedly taken under a provision intended to remove regulation nonetheless leaves regulation in place.

Commissioner Powell among others has expressed mounting concern over what he views as the agency's incorrect implementation of Section 10 toward rules that impact CMRS providers. He has warned that the Commission's attempt to set CMRS forbearance standards would result in unjustified rules "based on speculative fears and outdated rationales that raise the bar so high that future and pending forbearance

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[23] H.R. No. 104-458, 104th Cong., 2d Sess., at 1 (1996).

petitions – even in the most competitive segment of the telecommunications industry and in geographic markets that are fully competitive – do not seem to stand a chance."[24] He again objected to the Commission's refusal to forbear from imposing new rate integration obligations on CMRS providers, pointing out that, given the deregulatory goals of Section 10, "the proponents of continued regulation (including the Commission) should bear a greater share of the burden under Section 10 than this and previous orders admit to."[25]

The *Order* preserves wireless LNP obligations based on the speculation that they may be needed at some future date, while avoiding the duty to develop facts at that time that could support those obligations. Far from using forbearance to remove regulation, the *Order* misuses it to escape having to justify regulatory burdens at all. This is not only in conflict with the goals of Section 10 but also with the deregulatory paradigm Congress enacted for telecommunications generally, and for CMRS in particular.[26]

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[24] PCIA Broadband Personal Communications Service Alliance's Petition for Forbearance, FCC 98-134 (July 2, 1998), Separate Statement of Commissioner Powell Dissenting in Part.

[25] Policy and Rules Concerning the Interstate Interexchange Marketplace, *Memorandum Opinion and Order*, FCC 98-347 (December 31, 1998), Dissenting Statement of Commissioner Powell at 4.

[26] The Commission stated this paradigm as follows: "Congress delineated its preference for allowing this emerging market to develop subject to only as much regulation or which the Commission and the states could demonstrate a clear-cut need." Petition of the Connecticut Dept. of Public Utility Control, 10 FCC Rcd 7025, 7031 (1995), *aff'd*, *Connecticut Dept. of Public Utility Control v. FCC*, 78 F.3d 842 (2d Cir. 1996). Here, however, wireless LNP will take effect based merely on a record that even the Commission agreed did not require wireless LNP today.

B. The order's premise that wireless LNP must be deployed to allow number pooling is invalid.

As all parties and Commission staff involved in this proceeding well know, the *Order's* retention of the wireless LNP obligation was principally based on the assumed "linkage" to the Commission's concerns about number exhaust. The Commission did not remove the obligation because it thought that number pooling might at some point be adopted as a solution to number exhaust, that wireless carriers might have to participate in pooling, and that wireless LNP was necessary to implement pooling. Thus the Commission defends its decision to merely defer the rule as follows: "Implementation of LNP is a necessary precondition to the implementation of number pooling techniques used to conserve numbers."[27] This finding was neither legally proper nor factually correct.

1. The order reverses proper decisionmaking by maintaining a rule based not on any present need but on what might happen in the future.

Although the *Order* was explicitly based on the belief that wireless LNP would be needed in order to deploy pooling, no wireless carrier is currently subject to pooling. Thus, at the time the *Order* was adopted, the Commission had not required, or even proposed, number pooling as a number exhaust solution. The *Order* is thus based on a perceived cause-and-effect linkage to a rule that does not even exist. The Commission admits that no decisions have been made about when or even whether to require number pooling for any carriers, let alone for wireless carriers, but finds that because it

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[27] *Order*, at ¶ 43.

might possibly do so in the future, wireless LNP should be enforced at a later date. The justification for a current rule has thus been tied to what might occur in a future rulemaking.

The *Order's* cart-before-the-horse approach is improper. It rationalizes a requirement not on any current demonstrated need, but on what the Commission may do at some indeterminate future time – and in another proceeding on another matter. The Commission has refused to follow this approach in other contexts. For example, it routinely rejects requests to impose on license applicants conditions or requirements which are the subject of pending rulemakings.[28] These decisions correctly reason that merely because such requirements may be found to be warranted at a later date is not a basis to require them now, and that imposing requirements based on speculation about what might be done in the future is improper. Here, the Commission took the opposite approach and retained a requirement it found to be unnecessary now, because of what the agency might do in a separate rulemaking. This unexplained and unjustified reversal of policy is even more objectionable here because the proceeding that would supposedly be linked to wireless LNP had not even begun.

There is also no basis for this approach in previous orders addressing number portability. The original decision to impose wireless LNP was not based on any link to number pooling, but on the finding that "it will promote competition among cellular, broadband PCS, and covered SMR carriers, as well as among CMRS and wireline

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[28] *E.g.*, Tele-Communications, Inc. and AT&T Corp., FCC 99-24, CS Docket No. 98-178 (released February 18, 1999), at ¶ 43; NYNEX Corporation and Bell Atlantic Corporation, 12 FCC Rcd 19985 (1997), at ¶¶ 220-222.

providers."[29] Number conservation was not shown to be a rationale for wireless LNP. Given that there was no record (let alone any decision) establishing that number conservation requirements can and should be imposed on wireless carriers, wireless LNP could not be rationalized on this theory.[30]

Courts have warned agencies that they cannot base rules merely on speculation about what might happen in the future.[31] That principle is particularly applicable where what might happen is in the control of the Commission itself. The Commission has told

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[29] Telephone Number Portability, 11 FCC Rcd at 8433, ¶ 155. Number conservation is mentioned only in passing in this decision, and then only in the context of justifying the rules for landline LNP. *See* AT&T Wireless Services, Inc., *Ex Parte* Letter, February 1, 1999: "The Commission's decision to order the implementation of LNP by wireless carriers was based solely on competitive concerns and, until the December 16 *Order* was issued, number conservation had never been raised by the Commission as a rationale for requiring LNP."

[30] Parties raised this very concern, but the *Order* ignored it. *E.g.,* AT&T Wireless Services, Inc., *Ex Parte* Letter, February 1, 1999: "The dearth of a record on this issue or any notice to carriers that they will now have to satisfy new hurdles calls into question the Commission's legal authority" to tie forbearance from wireless LNP to number conservation; AirTouch Comments, NSD File No. L-98-134, filed December 21, 1998; CTIA Comments, NSD File No. L-98-134, December 21, 1998, at 3: "Denying forbearance based on assumptions as to the possible relevance of WNP to the numbering issues addressed in this proceeding would be an unlawful *post hoc* rationalization of the Commission's WNP rules."

[31] *See Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 391-92 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974); *International Harvester v. Ruckelshaus*, 478 F.2d 615, 642 (D.C. Cir. 1973).

wireless carriers to build toward wireless LNP based on the possibility of actions the agency may take in the future.[32]

2. The Order's key factual premise was wrong.

The *Order* is also wrong on the facts. Its key premise – that wireless LNP is necessary for CMRS carriers to participate in number conservation – is incorrect. There are many approaches to conserving number resources which have nothing to do with LNP, and the most-discussed form of number pooling, thousands-block pooling, does not require implementation of wireless LNP.[33] Requiring CMRS providers to implement wireless LNP would force carriers to incur significantly greater expenses and would only delay their ability to implement thousands-block pooling (should that requirement eventually be imposed). The *Order*, however, ignores that record information.

As an initial matter, nothing GTE says in the context of this pleading should be read as support for thousands-block number pooling. There is no record basis for the Commmission to impose thousands-block number pooling on wireless carriers. As the record in this proceeding demonstrates, wireless carriers are efficient users of telephone numbers.

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[32] The *Order* compounds its improper approach by reaching inconsistent conclusions about the linkage. Having first claimed that it needed to impose in the future the wireless LNP requirement, because it was needed to address number exhaust, the *Order* then contradicts itself by correctly pointing out that alternative number conservation proposals in the record "demonstrate that there are certain number conservation techniques that are not LNP-based." *Order*, at ¶ 47.

[33] *See* PrimeCo Comments, at 15-16; CTIA Reply Comments, at 20; GTE Reply Comments, at 4-5; GTE Ex Parte Letter, CC Docket No. 96-115 (Nov. 13, 1998).

The attached declaration by Daniel S. Mead, Vice-President, Technology & Operations Support for GTE Wireless supports the record by explaining the key error the *Order* made in linking LNP to thousands-block number pooling.[34] Mr. Mead describes thousands-block number pooling and the reasons why LNP is not a "necessary precondition"[35] to implement it. Thousands-block pooling requires the numbering administrator to pre-assign thousands block number ranges to the CMRS carrier's Mobile Switching Center ("MSC"). When the carrier activates a block, the administrator broadcasts the Location Routing Number ("LRN") of the MSC to all Local Service Management Systems or publishes the LRN in the Local Exchange Routing Guide ("LERG"). Routing to the pooled numbers would take place after a query to the Number Portability Database to obtain the LRN. The LRN technology required for thousands block number pooling, which is often referred to as "Phase I" portability, is already in use to enable wireless carriers to query portability databases.

In contrast, the technology that is necessary to implement full portability of wireless numbers, known as "Phase II," involves far more complex technical upgrades and systems work, including the separation of the MDN and MIN. This work is not needed to implement thousands-block number pooling, which can be deployed less expensively without deploying Phase II LNP as well. Unlike the onerous requirements

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[34] As stated in his Declaration, Mr. Mead is responsible for technology planning, industry standards direction, and network architecture for GTE Wireless. As such, he has detailed knowledge and experience in both wireless portability and numbering matters. Mr. Mead's Declaration is appended to this petition as Attachment A.

[35] *Order*, at ¶ 43.

of LNP for CMRS carriers, thousands-block pooling can be implemented without a redesign of the wireless network.[36] Mr. Mead's Declaration concludes:

> The FCC based its decision to maintain the Phase II WNP rule on its belief that implementation of WNP "is a necessary precondition to the implementation of number pooling techniques used to conserve numbers." This is not correct. Given the many technical differences between Phase II WNP and thousands-block number pooling, . . . Phase II WNP is not technically necessary for wireless carriers to deploy thousands-block pooling. In other words, Phase II WNP and thousands-block pooling are technically severable. In addition, requiring Phase II WNP would not provide carriers with all of the functionality necessary to deploy thousands-block pooling.[37]

C. The order's findings about CMRS competition conflict with retaining the rule.

The *Order* found that the three statutory elements to forbearance existed. First, LNP is not needed to ensure that a carrier's rates are just and reasonable: "We do not perceive LNP requirements as necessary to promote such competition. . . . Not only is CMRS competition currently growing rapidly without LNP, but in the near term, LNP does not appear to be critical to ensuring that this growth continues."[38] Second, it held that wireless LNP was not necessary to protect consumers: "The demand for wireless number portability among CMRS consumers is currently low and . . . consumers are more concerned about competition in other areas such as price and service quality."[39]

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[36] GTE notes, however, that pooling will require additional work that would not be accomplished through the implementation of wireless LNP.

[37] Declaration at ¶ 3.

[38] *Order*, at ¶ 19.

[39] *Id.*, at ¶ 22.

High consumer "churn" indicated "that many wireless customers easily and routinely switch from one carrier to another without the benefit of number portability."[40]

Third, the Commission found that the public interest supported postponing wireless LNP. It agreed that the public would benefit by allowing carriers to focus resources on network buildout and technical improvements, and found "insufficient competitive benefit to justify the cost and technical burden of implementing LNP more rapidly."[41] In addition, the Commission found that the current deadline was unrealistic and that implementation would not promote wireless-to-wireless or wireless-to-wireline competition.[42]

The Commission correctly concluded that conditions required it to forbear from applying the wireless LNP rule. But it then reversed course. It decided that the continuation of these favorable, pro-competitive trends warranted keeping wireless LNP in place and requiring carriers to move toward deployment. Thus, the trends that the Commission cited as establishing the Section 10 showing also led it to deny what Section 10 actually required -- eliminating the requirement.

This approach is illogical as well as unlawful. Carriers' success in doing the things the Commission wants – such as converging with landline and competing even more vigorously – leads to the "reward" of having to bear the heavy costs of wireless LNP. In effect, the price for competitive success is more regulation.

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40 *Id.*

41 *Id.*, at ¶ 25.

42 *Id.*, at ¶¶ 29-34.

The findings about CMRS that warranted forbearance cannot be squared with the *Order's* conclusion that wireless LNP will continue to be a mandate carriers must later meet. For example, the Commission asserts that, as competition among CMRS providers produces lower prices, "there is a greater likelihood that customers will view their wireless phone as a potential substitute for their wireline phones" and that "the ability of customers to port numbers both to and from wireless carriers is likely to be an increasingly important factor in consumer choice."[43] But there are no facts supporting these claims. The Commission points to no studies nor to any economic analyses of its own and thus lacks the requisite legal basis for this conclusion.[44]

The Commission also claims that the rule is needed because, as CMRS competition increases, CMRS carriers will not voluntarily implement LNP so as to discourage churn.[45] This statement, however, is sheer speculation that ignores the harmful effects of mandating industry-wide offerings. On the one hand, if and when wireless LNP is important to consumer choice (and even the Commission concedes it is

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[43] *Id.,* at ¶ 23.

[44] Missing as well from the *Order* is any recognition of the risk that the competitive trend in CMRS would not continue as successfully if CMRS carriers were required to implement LNP. The record established that wireless LNP would have a significant impact on CMRS costs, particularly on the very small carriers that the Commission is counting on to produce more competition. *See* CTIA Petition for Forbearance, at 6 ("Regulatory burdens that have not been proven to be warranted in the marketplace will serve mainly to dampen continued competition as carriers must divert their finite resources toward meeting the Commission's directives"). PCS carriers, among others, documented the harm portability would cause to their efforts to compete. *E.g.*, PrimeCo Comments, at 2-5. The *Order* does not establish how or why these harms will somehow vanish by November 2002.

[45] *Order,* at ¶ 41.

not important today), consumers who want to port a number will not subscribe to or stay with a carrier that cannot accommodate them. A CMRS carrier will decide whether to pursue such customers based on the potential economic benefit of doing so.[46] On the other hand, there may be consumers for whom wireless LNP is irrelevant or who find no inconvenience in having a "home" phone number and a "mobile" phone number. Under mandatory wireless LNP, carriers (and ultimately customers) are forced to pay for a technology that many customers may not want.[47] The Commission has found that demand for portability is low, and has no evidence that could allow it to speculate that this will change as of November 2002. Yet it uses future demand for wireless LNP as a reason to retain the rule. A rule imposing wireless LNP is not needed to encourage implementation of LNP when it is important to consumers, and, in the meantime, it has the negative impact of restricting, rather than broadening, consumer choice.

The Commission also asserts that "a regulatory mandate is necessary to the full implementation of wireless number portability, in order for it to support nationwide roaming."[48] But this mandate again places the cart before the horse. If there is no LNP obligation when LNP might become important to consumers, then the marketplace will

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46 *See* PrimeCo Comments, at 14 (filed Feb. 23, 1998) (for CMRS carriers, "the decision when – and whether – to enter the local exchange market will be determined entirely by reviewing market conditions and business opportunities. *Mandatory number portability will have no bearing on that decision.").*

47 *See* Comments of Southwestern Bell Mobile Systems, et al., at 8 (filed Feb. 23, 1998) ("The imposition of additional costs on CMRS providers to implement number portability—which has been shown to be extremely challenging and complicated technologically—expressly contravenes the public interest in lower prices").

48 *Order*, at ¶ 41.

force CMRS carriers and consumers to develop whatever methodology is necessary (including possibly LNP) to accommodate roamers with ported numbers without intervention by the Commission. Indeed, CMRS carriers have already agreed on a standard for separation of the Mobile Identification Number (MIN) and Mobile Directory Number (MDN),[49] which potentially can be used to accommodate number ported roamers. To impose now an obligation to implement LNP without determining whether such a feature is valued or necessary in the marketplace for "roaming" services is regulation for the sake of regulation, and ignores the competition-based premise of the 1996 Act.[50]

The few carriers that opposed CTIA's petition added nothing to the record justifying implementation of wireless LNP now or in the future.[51] The Commission found these carriers wrong on the facts relevant to the Section 10 analysis, and cannot rely on them to provide information on the CMRS marketplace in 2002. Neither the Commission nor the opponents of CTIA's Petition have demonstrated any reason for the Commission to have the wireless LNP obligation remain in effect.

The Commission has repeatedly been cautioned by courts that its rules must be based on existing facts, not assumptions – particularly assumptions about what conditions might exist years in the future. Only last week, the Commission was

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[49] *See* CTIA *Ex Parte* Letter, CC Docket No. 95-116, November 30, 1998.

[50] *See* GTE *Ex Parte* Letter, CC Docket No. 95-116, November 13, 1998.

[51] *See* Opposition of Worldcom, at 3-4; Opposition of the Telecommunications Resellers Association, at 7.

reversed on appeal for basing its price cap rules on an expected "upward trend" in the "X-Factor."[52] The court held that "reliance on the upward trend necessarily reflects the (unexplained) assumption that the trend will continue," and that the record did not support that assumption. Similarly, the Commission cannot assume circumstances that would support continued enforcement of its rules. In another case, the court reversed the Commission for not initiating a rulemaking when the predicate for the rules at issue had disappeared.[53] The court held that enforcement of rules cannot be based on mere assumptions about the public interest rationale on which they are premised.

Here, the Commission committed the same error by keeping the wireless LNP rule in place while finding that current conditions support forbearance. The Commission assumed that the current marketplace conditions will change by November 2002, and in a way that requires wireless LNP. That assumption is unsupported. On that basis alone, last week's price cap decision and other cases require that it be corrected. More fundamentally, the *Order* violates the Commission's mandate to regulate only where necessary. There is no legal or factual basis on which it could conclude that the growth in wireless services and competition merits more regulation – yet that is the bottom line of the *Order*.

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[52] *United States Telephone Ass'n v. FCC*, 1999 U.S. App. LEXIS 9768 (D.C. Cir. May 21, 1999).

[53] *Geller v. FCC*, 610 F.2d 973, 980 (D.C. Cir. 1979). *See also Bechtel v. FCC*, 957 F.2d 873, 891 (D.C. Cir. 1992) (changes in factual and legal circumstances may impose an obligation on the Commission to reconsider settled policy or explain why it has not done so).

III. CONCLUSION

For the reasons set forth above, GTE requests that the Commission grant reconsideration and forbear from enforcing the wireless LNP rule. If at a later date facts come to the Commission's attention that warrant considering whether to re-impose the rule, the Commission can at that time begin a proceeding.

Dated: May 27, 1999

Respectfully submitted,

GTE Service Corporation and its telephone and wireless companies

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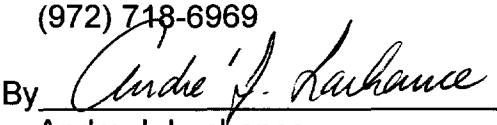
By 

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Their Attorneys

ATTACHMENT A

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Cellular Telecommunications Industry	)	WT Docket No. 98-229
Association's Petition for Forbearance	)	
From Commercial Mobile Radio Services	)	
Number Portability Obligations	)	
	)	
and	)	
	)	
Telephone Number Portability	)	CC Docket No. 95-116

DECLARATION OF DANIEL S. MEAD

I, Daniel S. Mead, declare as follows:

1. I am Vice President – Technology & Operations Support for GTE Wireless Incorporated ("GTEW") and am responsible for technology planning, industry standards direction, and network architecture. As such, I have personal knowledge of the matters stated below.

2. The FCC has ordered wireless carriers to implement wireless local number portability ("WNP") in two phases. First, the FCC required wireless carriers to have the capability in Phase I to route wireline ported numbers by December 31, 1998. Second, the FCC has required wireless carriers to support Phase II service-provider number portability, including the ability to support nationwide roaming, by November 24, 2002.

3. The FCC based its decision to maintain the Phase II WNP rule on its belief that implementation of WNP "is a necessary precondition to the implementation of number pooling techniques to conserve numbers."[1] This is not correct. Given the many technical differences between Phase II WNP and thousands-block number pooling, I believe that Phase II WNP is not technically necessary for wireless carriers to deploy thousands-block number pooling.[2] In other words, Phase II WNP and thousands-block number pooling are technically severable. In addition, requiring Phase II WNP would not provide carriers with all of the functionality necessary to deploy thousands-block pooling. To the contrary, it would likely increase the costs and the time needed to deploy thousands-block pooling, should that approach to number exhaust eventually be required.

4. **This Declaration does not endorse the requirement for wireless carriers to implement thousands-block number pooling. I believe that thousands-block number pooling for wireless carriers is not warranted or justified.** I would note that wireless participation in thousands-block number pooling would not contribute to number conservation in the same manner as wireline thousands-block number

[1] Cellular Telecommunications Industry Association's Petition for Forbearance From Commercial Mobile Radio Services Number Portability Obligations and Telephone Number Portability, WT Docket No. 98-229, CC Docket No. 95-116, *Memorandum Opinion and Order*, para. 43, released Feb. 9, 1999.

[2] Thousand's Block Pooling is based upon pre-porting of 1000 block ranges of non-contaminated numbers geographically limited to an existing rate center. I do not consider pooling based on port on demand. Further, this analysis applies only to thousands-block pooling. I believe that individual number pooling, by contrast, would require Phase II WNP at a minimum. There is, however, little support for and significant technical problems with individual telephone number pooling.

pooling because wireless carriers typically take numbers from fewer rate centers than wireline carriers, and wireless services are not bound by rate centers.

I. Number Portability and Thousands-Block Number Pooling Require Separate Technical Functions

5. The Location Routing Number ("LRN") method currently in use today serves as the primary building block for wireline local number portability and Phase I WNP. LRN technology would likewise support the implementation of thousand-block number pooling by both wireline and wireless service providers. In contrast, based on what we know today, the additional efforts that wireless carriers will undertake to design and deploy WNP Phase II,[3] which include the separation of the Mobile Directory Number ("MDN") and Mobile Identification Number ("MIN"), are not required capabilities for wireless carriers to provide thousands-block number pooling.

6. The wireless industry has determined that Phase II WNP can best be accomplished through the separation of the MDN and MIN. This separation is necessary in a ported environment where a ported subscriber roams outside his or her home network. Thousands-block number pooling, by contrast, could be implemented without the separation of the MDN and MIN.

[3] This would apply both to Phase II WNP and "Phase III." Phase III refers to efforts to address the impact of the MIN/MDN separation on features such as Short Message Service, but does not entail core operability issues. Phase III is still in the standards process.

7. To support thousands-block number pooling, the NANPA ("North American Number Plan Administrator") or the number pooling administrator would allocate thousands-block number ranges to a wireless service provider's Mobile Switching Center (MSC), and the pooling administrator would broadcast the LRN of the MSCs (NPA-NXX-X) to all Local Service Management Systems ("LSMS") or publish it in the Local Exchange Routing Guide (LERG). This broadcast could take place when a wireless carrier activated a block of a thousand numbers. Routing to pooled numbers could occur after a query to the Number Portability Database ("NPDB") to obtain the LRN. While additional capabilities and standards would still have to be developed to support thousands-block number pooling, it could nevertheless be implemented without the Phase II WNP capabilities.

8. The FCC has expressed concerns that without Phase II WNP capabilities in place, wireless carriers would not be able to implement thousands-block number pooling techniques. This is not correct. Only the availability of the LRN functionality already in place and additional potentially significant refinements to LRN that could be contained in thousands-block number pooling standards would be necessary to implement thousands-block number pooling.

II. Thousands-Block Number Pooling Would Require Significantly Fewer Alterations to Back Office Systems Than Number Portability

9. The impacts to the network and back end systems necessary to support WNP Phase II are onerous and well documented. Because thousands-block number pooling could be accomplished without Phase II WNP capabilities, wireless carriers would not be faced with redesigning their customer care, provisioning, and billing systems if they were ordered to implement thousands-block number pooling without the Phase II WNP requirement. In addition, there are several other benefits that can be obtained in technically severing thousands-block pooling from Phase II WNP:

- It would decrease the required storage capacity of the LSMS, because information would be stored only at the thousands-block rather than at the individual phone number level.
- The frequency of requesting the Number Portability Administration Center ("NPAC") to activate thousands-blocks for pooling would be magnitudes lower than that of porting in or out individual wireless numbers to support service provider portability. Furthermore, the requirement for a dedicated SOA ("Service Order Activation") would be eliminated.
- There would be no need for new translation types specifically for routing using MDN instead of the MIN.

- As stated above, I believe thousands-block pooling would not require nationwide wireless coordination for implementation[4] and would not impact nationwide roaming.

10. If the Commission were to order thousands-block number pooling, deploying the incremental enhancements necessary to support thousands-block pooling that employs the current LRN routing (WNP Phase I) would be burdensome and difficult, but it would require fewer resources than developing WNP Phase II and thousands-block pooling methodologies in tandem. In addition, it would be more costly to continue in the design and deployment of WNP Phase II only to be required to make additional enhancements to deploy thousands-block pooling at a later date.

11. Depending upon the time required for standards development, the requirement to deploy Phase II WNP in conjunction with thousands-block number pooling would significantly extend the time frame it would take for wireless carriers to participate in thousands-block pooling if ordered by the Commission.

III. The Implementation of Number Portability Does Not Provide Carriers the Ability to Implement Thousands-Block Number Pooling

12. Although the LRN methodology used to support wireline local number portability and Phase I WNP would serve as a building block for thousands-block number pooling, I do not believe that the current Phase II WNP development work focused on the split of the MIN and MDN will

[4] The separation of the MIN/MDN must be supported by all wireless carriers in order to maintain seamless nationwide roaming.

promote the availability of thousands-block number pooling. In addition, with respect to timing, the current estimate for pooling provided to the North American Numbering Council ("NANC") did not take into consideration a full impact analysis of the standards efforts on network vendors. As the FCC recognizes, after standards bodies complete their work, manufacturers typically require 18 months to two years to integrate the new standards. Finally, limited resources would impede any ability to conduct parallel implementation of thousands-block number pooling and WNP. Therefore, there is significant uncertainty whether wireless carriers could implement thousands-block number pooling by the November 24, 2002 deadline for Phase II WNP.

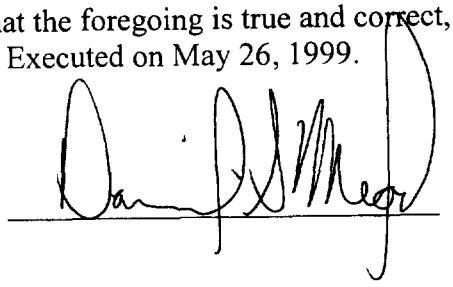
13. Not only will the additional work on Phase II WNP fail to enable wireless carriers to implement thousands-block number pooling, it would not address the incremental standards that will be required to provide thousands-block pooling. While serving as the building block for thousands-block number pooling, the LRN capabilities defined in WNP Phase I would require significant additional evolution for wireless carriers to participate in thousands-block number pooling.

IV. CONCLUSION

14. Contrary to the FCC's conclusions in this docket, the implementation of service-provider number portability by wireless carriers is not a precondition for wireless participation in thousands-block number pooling.

Additional efforts spent in the design and deployment of Phase II WNP will only delay rather than hasten deployment of thousands-block number pooling if ordered by the FCC. Finally, I reiterate that thousands-block pooling for wireless carriers unwarranted.

I declare, under penalty of perjury, that the foregoing is true and correct, to the best of my knowledge and belief. Executed on May 26, 1999.



CERTIFICATE OF SERVICE

I, Judy R. Quinlan, hereby certify that copies of the foregoing "Petition for Reconsideration" have been mailed by first class United States mail, postage prepaid, on May 27, 1999 to the parties of record.

Judy R. Quinlan